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November 2, 2015

Newton Tedder
Office of Ecosystem Protection
U.S. Environmental Protection Agency – Region 1
5 Post Office Square – Suite 100
Boston, MA 02109-3912

Re: **New Hampshire MS4 Communities' Joint Comments in Response to Proposed Draft General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems, NPDES Permit Nos. NHR041000, NHR042000 and NHR043000**

Dear Mr. Tedder:

On behalf of the following New Hampshire MS4 Communities that comprise the New Hampshire Stormwater Coalition:

Town of Amherst
Town of Bedford
Town of Danville
City of Dover
Town of Hampton
Town of Londonderry
City of Manchester
Town of Merrimack
City of Portsmouth
Town of Raymond
City of Rochester
Town of Rollinsford
Town of Salem
Town of Stratham

Pursuant to the re-opening of the comment period on select sections of the Draft Small Municipal Separate Storm Sewer System (MS4) NPDES General Permit-New Hampshire, Hall & Associates and Sheehan Phinney Bass + Green, PA submit these joint comments in reference to Sections 2.1.1, 2.2 (including all subsections), Appendix F and Appendix H.

In addition to these joint comments, many of the above-listed communities are submitting separate comments to address specific issues that relate to the individual concerns of those communities.

If there are any questions on the comments or further information is required, please do not hesitate to contact us.

Very truly yours,

Robert R. Lucic

Enc.

Comments on Stormwater Rule Amendments

The following presents the comments of the following New Hampshire MS4 communities: Town of Amherst, Town of Bedford, Town of Danville, City of Dover, Town of Hampton, Town of Londonderry, City of Manchester, Town of Merrimack, City of Portsmouth, Town of Raymond, City of Rochester, Town of Rollinsford, Town of Salem and Town of Stratham regarding the proposed MS4 general permit provisions EPA has republished for comment on September 1, 2015.

Incorporation by Reference

The prior comments submitted by the NH Stormwater Coalition are hereby reiterated and incorporated by reference. In particular, comments on pages 6-12, 15-17 and 23-29 are also applicable to this set of proposed changes.

General Comments

EPA is proposing a permitting approach in revised permit provisions (*e.g.*, Sections 2.1.1, 2.2, 2.2.2, 2.3.6) that are (1) not authorized by Section 402(p) of the Clean Water Act, (2) not authorized by the adopted storm water permitting rules 40 CFR 122.26 *et seq*, (3) inconsistent with data and analysis requirements applicable to establishing water quality-based permitting under 40 CFR 122.44(d) and are contrary to the agency's published decision addressing various petitions for residual designation under CWA Section 402(p). In essence, EPA is acting beyond its statutory and regulatory authority in seeking to enact these provisions. Specifically, EPA's proposal concludes that it is acceptable to presume that all MS4 stormwater sources have the reasonable potential to cause and contribute to water quality standard violations, without the use of any site-specific data analyses or assessment of the various loading sources causing an exceedance to exist or any existing or proposed controls that are intended to address or resolve the exceedance. Such "probabilistic" analyses (*i.e.*, claiming that one can presume the specific stormwater discharge is causing a violation of applicable water quality standards based on generalized information) (1) are not authorized by the APA or the applicable NPDES rule for stormwater permitting and (2) was expressly rejected by EPA in turning down the various petitions for rulemaking filed by NRDC and others (*e.g.*, CLF) on this subject.

Clean Water Act provisions, like their Clean Air Act counterparts, are based on a causation demonstration confirming the need for the addition pollution reduction requirements (*See*, e.g., Sierra Club v. EPA, No. 12-2853 (7th Cir. Dec. 16, 2014).) Such causation demonstration must be "more than simply draw[ing] a correlation in the absence of an adequate causative link." Id. Moreover, the impact must be "reasonably attributed" to the pollutant sources. *Id.* While 40 C.F.R. § 122.44(d) doesn't require the relationship to be documented to a scientific certainty, the

phrase "reasonable potential" was not intended to allow the imposition of limitations simply based upon speculation that a discharger is causing or contributing to an impairment. EPA's misplaced claim aside, the entire Clean Water Act is premised on the idea of regulating when "necessary" (assessing causes and effects) to ensure one is regulating the proper pollutant at the proper level. For instance:

- All EPA WQS/criteria are based on a cause/effect demonstration or at the level necessary to protect use; [*See* 40 C.F.R. § 131.3(c); 40 C.F.R. § 131.2(a)]
- Water quality-based effluent limitations when dischargers are interfering with attainment of water quality; [CWA § 302(a)]
- EPA guidance on nutrient regulation for estuaries explicitly requires cause and response relationship; [*See* Att. 65, EPA Estuarine Criteria Guidance at 7-5, *passim*]
- EPA guidance providing how to use ambient data to make valid cause and effect predictions for nutrients. [*See* Att. 59, EPA Stressor Response Guidance, at 6, 32]

The NPDES permitting program merely integrates these aspects of the CWA (*e.g.,* water quality standards, impairment listings, etc.); it isn't an independent program that creates additional effluent restrictions without a site-specific demonstrated need. Put differently, EPA can't just arrive at the permitting stage and do what it pleases. *Am. Paper Inst. v. United States EPA*, 996 F.2d 346 (D.C. Cir. 1993). The point is simple – without some reasonable cause/effect analysis, which EPA agrees that it does not possess in this case, there is no objective basis to determine (1) if the pollutant is part of the problem, (2) if something else is responsible, or (3) how much control is needed. Consequently, this proposed permit action is fundamentally flawed and must be withdrawn.

These are precisely the same conclusions drawn when EPA rejected multiple petitions from NRDC and CLF to use "residual designation" authority to establish more restrictive "water quality-based" requirements on presently unregulated stormwater sites. (*See*, EPA Region 1,3, and 9 petition response letters from March 2014). In rejecting the petitions, EPA observed that it was required to (1) evaluate the nature of the individual watersheds (2) assess the nature of the impairment (3) determine the extent to which stormwater discharges contributed to the problems and then, if appropriate, only regulate "significant contributors". (*See*, *e.g.,* EPA Region I response of March 11, 2104 at 1). EPA noted that the available data must be sufficient to allow these assessments to occur and that Section 303(d) listings "*alone do not provide the connection between the impairments and any ...stormwater sources.*" (*Id* at 9 – emphasis supplied). EPA ultimately concluded that the available data "does not provide the Region with specific information about the specific sources within the Region." *Id.* In rejecting the petition, EPA concluded that "Petitioner's approach is too simplistic." Id.

It is not apparent how EPA could conclude that certain data requirements and specific showings are necessary to regulate stormwater discharges on the basis of alleged water quality impairment and then, a mere 18 months later, assert that the same "simplistic" approaches (without the necessary data and analyses) are now acceptable for imposing more restrictive requirements on the MS4 communities. Such action is a quintessential example of arbitrary and capricious behavior under the Federal Administrative Procedures Act.

General Objections Applicable to Entire Regulatory Action

Case Specific Impact Demonstration Is Required by the Act and Existing Rules to Impose More Restrictive Water Quality-based Limits

EPA's Nov. 26, 2014 MS4 stormwater policy paper[1] states that in order to impose a water quality-based limitation on a stormwater discharge, a site-specific finding must be made on an individual permit basis showing that a discharge needs a specific water quality based limitation:

> "Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that the NPDES permitting authority exercise its discretion to include clear, specific, and measurable permit requirements and, where feasible, numeric effluent limitations as necessary to meet water quality standards." (at 4).

Page 10 of EPA's stormwater guidance provides a sample permit provision that illustrates how such a limit is to be structured:

> "Discharges from the MS4 must not cause or contribute to exceedances of receiving water limits for Diazinon of 0.08µg/L for acute exposure (1 hr averaging period) or 0.05µg/L for chronic exposure (4-day averaging period), OR must not exceed Diazinon discharge limits of 0.072 µg/L for acute exposure or 0.045µg/L for chronic exposure (2013 San Diego, CA Regional MS4 permit)."

Rather than complete the necessary analysis considering the requisite site-specific factors and create the specific limitation necessary to resolve the impairment concern, EPA has created a general conclusion that since all stormwater contains metals, nutrients, and bacteria, one may simply presume that the discharge significantly "causes or contributes" to downstream water quality exceedances, whenever those pollutants are identified as exceeding water quality standards on a Section 303(d) list. This "guilty until proven innocent" approach is not authorized by any implementing regulations under 40 CFR 126 *et seq* and is clearly contrary to the requirements of 40 CFR 122.44(d) for the following reasons:

[1] http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf

- EPA is presuming that the stormwater discharge contribution to an alleged impairment is more than "*de minimis*" with no data or analyses to support that conclusion. The Act does not authorize EPA to regulate "*de minimis*" pollutant contributions. (*Alabama Power Co. V. Costle*, 636 F.2d 323 (D.C. Cir. 1979) ("the law does not concern itself with trifling matters"); *Public Citizen v. Young*, 831 F2.d 1108 (D.C. Cir. 1987) (statutory implementation should not yield "futile results"). EPA itself has stated such contributions do not have to be regulated under the federal stormwater and water quality-based permitting programs.[2]

- All water quality based analyses must consider the factors identified in 40 CFR 122.44(d)(ii) regarding current data on the relative contribution of other sources, available dilution and existing and anticipated pollutant reductions from the major sources of the pollutant of concern – EPA's analysis does none of this. It is axiomatic that an agency must conform its actions to its published rules. *U.S. v. Nixon*, 418 U.S. 683 (1974). EPA's action plainly fails to consider the factors required by the adopted rules as a prerequisite to imposition of a water quality-based limitation. These are the prerequisites EPA itself applied to the NRDC/CLF petitions. Such action is therefore, *per se*, arbitrary and capricious under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (U.S. 1983), the seminal case governing review of agency decision making under the federal Administrative Procedures Act.

- The existence of a Section 303(d) listing at some downstream location does not provide a rational basis for concluding that all contributing or upstream stormwater sources must be regulated to achieve water quality standard compliance. (*See*, EPA Region I NRD/CLF petition response). First, fate and transport of the pollutant must be considered as pollutants settle and bacteria die off. Thus, the amount of pollutant reaching the area of concern could be of no relevance for standards compliance. Second, the source of and timing of the conditions surrounding the impairment listing could have nothing to do with MS4 contributions (*e.g.*, combined sewer overflow, natural runoff, farm land contribution, local wild geese population, nutrient impact under low flow conditions when MS4 contributions are essentially non-existent). There is no rational basis to presume, *a fortiori*, that regulating MS4 loadings is always required to abate an impairment listing. In fact, as noted earlier, EPA's response to a similar approach requested by CLF/NRDC was rejected as contrary to existing rules and statutory requirements.

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[2] EPA authorizes *de minimis* changes to water quality under the federal antidegradation program. EPA's petition responses to NRDC and CLF concurred that the stormwater discharge must be more than *de minimis* for it to be regulated, it must be a "significant source of pollutants".

- Where the MS4 is not directly contributing the pollutant of concern to the segment where the impairment exists, it is plainly improper to presume further reductions must occur to achieve compliance downs stream. *National Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119 (D.D.C. 2012). In this instance, the MS4 is not causing or contributing to a standard violation at the point of discharge. This meets the terms of 40 CFR 122.44(d) under which no water quality-based limit is to be established. Unless EPA can demonstrate that some type of "cumulative" pollutant effect is only manifesting itself at a downstream location no limit is allowed. Absent such analysis in this document, EPA is acting beyond its statutory authority by regulating more stringently even discharges that meet water quality standards.

- EPA is also improperly presuming that whatever data used to develop a Section 303(d) listing reflects current conditions in the water body – this is also not objectively accurate. For example, the most current Section 303(d) listing for New Hampshire, at the time this action was proposed in 2015, was the 2010 Section 303(d) list – based on data from 2008 which are presently 7 years out of date. 40 CFR 122.44(d)(ii), however, requires that the Agency use "current data" in determining the need for water quality based limitations. As noted by EPA's Environmental Appeals Board "using the most currently available data is logical and rational in light of the need to assure compliance with water quality standards." *In re Town of Concord, Dep't of Pub. Works*, NPDES Appeal No. 13-08, 16 E.A.D. __, 14 (EAB 2014) (internal citations and quotations omitted). This regulatory action plainly fails to meet that requirement. The need for current information is underscored by the NHDES action on the proposed 2014 303(d) list, which has deleted many water bodies as not impaired, based on more recent regulatory analyses and data collection. This includes numerous nutrient impairment delistings for Great Bay Estuary – in consideration of a 2014 independent peer review conducted by DES and the local communities. It is plainly arbitrary and capricious for EPA to have created a rule – frozen in time – that fails to accommodate any assessment of current water quality data or other relevant scientific analyses to confirm or refute the need for more restrictive water quality based requirements for MS4 communities, as evidenced most clearly by the DES impairment actions for Great Bay Estuary.

- EPA's assertion that using approved Section 303(d) listings as conclusive proof of the need to regulate MS4 contributions of certain substances is directly at odds with EPA's legal arguments submitted to the DC Circuit and accepted by that court on that issue. *See Dover, et al. v. EPA*, Docket No, 1:12cv1994 (D.D.C. Dec. 13, 2012). The Court agreed with EPA that impairment listing do not trigger any specific regulatory mandates for communities discharging the pollutant of concern. Such action is merely a preliminary step in the process which may or may not result in the need for specific pollutant reductions from point sources. EPA's assertion that any downstream

impairment listing should always result in further restrictions on MS4 contributions is specifically at odds with the holding of that case - *that EPA itself sought.*

In summary, EPA's approach regulates by presumption and fails to develop the case-specific analyses (using current information) that is, by rule, required to impose a more restrictive water quality-based limitation. EPA is therefore acting inconsistent with the adopted rules and is acting beyond statutory authority.

A Prohibition on *"Causing or Contributing"* a Pollutant to Waters Exceeding Standards Does Not Exist Under the Act or Implementing Regulations

The revised Section 2.1.1.a. seeks to impose a new discharge prohibition for all MS4 dischargers – "such discharge may not cause or contribute to an exceedance of water quality standards." Once again, this new regulatory provision is infirm for a host of legal and technical reasons, as follows:

- As described in EPA's stormwater permitting guidance, noted above, a water quality-based limit must identify the specific numeric characteristics of the discharge that constitute compliance (*e.g.*, milligrams of pollutant for a specific flow rate or the allowable pounds of pollutant). See, 40 CFR 122.45(e),(f). Moreover, rather than establish a specific water quality-based limit regarding the pollutant of concern, EPA seeks to impose a vague "no cause or contribution" mandate – the most restrictive limitation possible. Such a non-specific compliance requirement is "void for vagueness" as it provides no objective basis to determine what actually constitutes compliance. *See McClellan Ecological Seepage Situation v. Weinberger,* 707 F. Supp. 1182, 1198 (E.D. Cal. 1988). Prohibitions based upon "contamination," "pollution" or "nuisance" lack precision and objectivity that led courts in NYS to dismiss similar CWA claims.[3] EPA must identify the specific limitation that would apply in this circumstance.

- The CWA does not allow for non-compliance to be based on the mere "contribution" of a pollutant to alleged water quality impairment or permit violations. *(See, National Ass'n of Metal Finishers v. EPA*, 719 F. 2d 624 (D.C. Cir. 1983)). Any alleged violation of CWA requirements must be based on a causation analysis that demonstrates the connection between the pollutant discharge and the alleged violation at issue.[4] (*Id* at 640

[3] EPA has, in other circumstances, indicated that not establishing a water quality-based limit may occur if (1) the pollutant is not discharged or (2) the discharge meets the applicable standard end of pipe. However, no such rule has ever been established and EPA Headquarters has not issued specific guidance asserting that meeting such limitations constitutes compliance with Section 301(b)1(C) of the Act.

[4] *See Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) ("State water quality standards generally supplement these effluent limitations, so that where one or more point source dischargers, otherwise compliant with federal conditions, *are nonetheless causing a violation of state water quality standards*, they may be further regulated to alleviate the water quality violation.") (emphasis added); *id.*, at 25-26

"that neither the language of the Act nor the intent of Congress appears to contemplate liability without causation.") *rev'd on other grounds Chemical Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116 (1985); *Ark. Poul. Fed. v. Envtl. Prot. Agency*, 852 F. 2d 324, 328 (8th Cir. 1988) (stating the discharge must at least be "a cause" of the violation). Simply claiming someone "contributed" a pollutant does not objectively provide such a demonstration and was rejected by EPA in its petition responses. Therefore, attempting to hold a community in violation of its MS4 permit simply because it contributes some amount of a pollutant is beyond EPA's statutory authority.

- The "no cause or contribute" discharge prohibition is contrary to both the adopted NPDES rules and the US Supreme Court case in *Oklahoma v. Arkansas*, 473 U.S. 610 (1985). As confirmed by the Supreme Court, the CWA does not contain a discharge prohibition simply because a discharge is contributing to a downstream water quality impairment or violation of a downstream state's standards. This restriction is certainly not contained anywhere in 40 CFR 122.26. Moreover, under the existing NPDES rules, and consistent with the Supreme Court decision, the "no cause or contribute" restriction only applies to *new sources* seeking permits to discharge to existing impaired waters (*See*, 40 CFR 122.4(i)). MS4 communities are not "new dischargers" under the Act. The relevant provision, 40 CFR 122.44(d), established that some limitation may be required for a discharge that "causes or contributes" a pollutant – it plainly does not establish that any such discharge may not "cause or contribute" as EPA has attempted to establish here. EPA is illegally seeking to amend the requirements of 40 CFR 122.44(d) to be more restrictive.

- EPA's action also illegally seeks to prevent communities from offsetting loadings of a particular pollutant from a different source and thereby obviate the need for any MS4 reductions – assuming that the contribution of the pollutant to a problem was significant. If the pollutant can be removed more cost-effectively by a POTW or another source, there is no requirement that the pollutant nonetheless be further restricted by the MS4 source.

- The Appendices (F/H) indicate that to avoid the more restrictive requirements the community must show that the pollutant is not "measureable" in the discharge. This effectively imposes the detection levels contained n 40 CFR Part 136 as effluent limitations that must be attained. There is no analysis, however, showing that these detection levels have anything to do with demonstrating standards compliance. On its face, the selection of detection levels as the required effluent limitations for all MS4 communities is arbitrary and capricious as the establishment of Part 136 detection levels has nothing to do with water quality standards attainment in general, and most certainly

nothing to do with the needs of specific water bodies identified as impaired on a state's Section 303(d) list.

- Finally, EPA's immediately applicable prohibition contained in this rule is contrary to the state's rules which allow for schedules of compliance where needed to achieve water quality standards compliance. Based on the existing state law, NPDES permits may contain extended schedules of compliance to achieve water quality-based limits. By establishing the discharge prohibition, EPA negates state law and places communities in immediate non-compliance for every Section 303(d) impairment listing for any pollutants EPA claims are measurable in all stormwater discharges (metals, bacteria, chloride, nutrients). EPA is required to issue permits consistent with the applicable state laws for proper implementation of water quality standards – not to run roughshod over those requirements. *See, In the Matter of Star-Kist Caribe, Inc.*, 3 EAD 172 (Apr. 16, 1990).

EPA's Non-TMDL Available Reduction Mandates Are Arbitrary and Capricious

EPA seeks to establish, presumptively, that anytime a discharge "causes or contributes" a pollutant related to some identified water quality impairment – the community must act to immediately eliminate the contribution of the pollutant. See, *e.g.*, 2.1.1.d. The record, however, contains no analysis showing that such a level of control (pollutant elimination or reduction to the level that does not "cause or contribute") is "necessary" to bring the waters of concern into compliance. In essence, EPA is leaping to the conclusion that the most restrictive effluent limitation possible (*e.g.*, meet water quality standards end-of-pipe or prove it can no longer be measured in the effluent) is the limit that is justified by the situation. This regulation is presumption, not analysis, and is contrary to the requirements of both the CWA Section 301(b)(1)(C) and 40 CFR 122.44(d) which require that only the "necessary" effluent limitation be established. This is beyond EPA's statutory authority and is inconsistent with the requirements of 122.44(d) since no objective basis is presented to demonstrate that the most restrictive limitation is required, in advance of a TMDL that could certainly establish that no limitation at all is required.

EPA is establishing that, in advance of a TMDL being prepared, a stringent "meet WQS end-of-pipe" is mandated by the adopted rules. EPA has never adopted such a rule and this would be a major modification to 40 CFR 122.44(d) which contains no such provision, but directs the permitting authority to use discretion considering the site-specific circumstances to fashion a reasonable effluent limitation, where a TMDL is not available. There are literally thousands of permits that have been issued and reissued in advance of TMDL completion that did not mandate WQS compliance end-of-pipe pending TMDL completion. Even the federal mercury and PCB TMDLs do not require any specific action to reduce mercury in MS4 discharges, though the level of mercury in stormwater is "measurable" and often exceeds the applicable WQS due to

atmospheric deposition. Plainly, the existence of a pollutant in a discharge does not and cannot create a presumption that a ban on "causing or contributing" the pollutant applies. EPA has not mandated that states follow this more restrictive approach when acting in their delegated program capacity in issuing permits or in issuing TMDL decisions. To the degree EPA is claiming that 40 CFR 122.44(d) mandates the result they are imposing, they are undertaking an illegal modification to the applicable rules.

Specific Objections

Approved TMDL Implementation Is Not Apparent for Bacteria – Section 2.2.1.e

An approved statewide bacteria TMDL has been approved by EPA. EPA has stated that the communities that "cause or contribute" bacteria must comply with the approved TMDL. *See, e.g.*, 2.1.1.b. However, the Bacteria TMDL, on its face, states that specific effluent limits are not to be applied to intermittent discharges and that the dilution in the receiving water must be considered in deciding what if any addition pollution reduction measures are needed. (Bacteria TMDL at 37, Note 2). Therefore, unless and until instream dilution is considered, which has not occurred in this TMDL, further measures to implement the approved bacteria TMDL are not apparent. Moreover, where CSO discharges or other illegal contributions (*e.g.*, direct discharge from septic systems) are the source of the bacteria exceedance, mandating more restrictive action by MS4 discharges is plainly inappropriate.

EPA Statements Regarding Aluminum Compliance Are Unsupported and Vague - Section 2.2.1.c

EPA's proposal recognizes that the TMDL analyses for aluminum do not mandate any action by MS4 communities, but asserts that if any contribution in excess of that present atmospherically is encountered, more restrictive "elimination" requirements automatically apply. The "elimination" of the condition is nowhere justified by the analyses presented in support of this regulatory action and is therefore arbitrary and capricious. There is no basis to conclude that where waters are presently not meeting standards due to atmospheric sources that any increment above that level must be eliminated – even if the incremental impact is *de minimis*. *Alabama Power Co. V. Costle*, 636 F.2d 323 (D.C. Cir. 1979) ("the law does not concern itself with trifling matters"); *Public Citizen v. Young*, 831 F2.d 1108 (D.C. Cir. 1987) (statutory implementation should not yield "futile results"). At a minimum, some site-specific analysis would be needed to justify the level of pollutant reduction needed under the specific circumstances.

Phosphorus Requirements – Section 2.2.1.f

Whether or not action is required by any and all MS4 areas tributary to a lake or pond with a phosphorus TMDL should be determined on a case-by-case basis, not ordered unilaterally by this rule. Such determination must be made consistent with the TMDL analyses, as mandated by 40 CFR 122.44(d)(1)(vii).

Chloride Requirements – General

The present chloride criteria utilized to derive TMDL reductions and identify waters as chloride impaired are seriously out of date. EPA has approved updated, less restrictive chloride criteria for several states in consideration of the extensive database of new studies confirming that less restrictive chloride criteria are protective of aquatic life resources. Before further implementation of the TMDLs that were based on the outdated standards, NH communities will be requesting either statewide or site-specific use of the updated criteria.

Claim to Regulate Non-Water Quality Listed Segments – Section 2.2.2

EPA asserts that any existing "water quality limited" segment without an approved TMDL must be addressed by implementing more restrictive requirements by the MS4 discharge in that area, or at times, tributary to the area of concern. Additional implementation and study requirements are identified in Appendix H. Beyond regulating waters that are specifically found to be water quality impaired, EPA is also asserting authority to impose more restrictive MS4 requirements on (1) waters that NHDES expressly concluded are NOT impaired at this time (*e.g.*, Great Bay Estuary – see proposed 2014 listing) and (2) any waters not previously identified as impaired by NHDES, but new information indicates may be impaired ("any other permittee that, during the permit term, becomes aware that its discharge is to a water body that is water quality limited…"). EPA's proposed approach is inappropriate for several reasons:

- Where more recent data under evaluation by NHDES indicate that a prior impairment no longer exists (such as in the case for nitrogen in Great Bay Estuary), EPA must provide for an allowance to use the most current information and analyses. Continued reliance on outdated information is plainly not consistent with the NPDES program requirements. The Cities of Dover, Portsmouth, and Rochester are most certainly not causing or contributing to a nitrogen induced water quality impairment. As confirmed by the 2014 Independent Peer Review and verified by NHDES in its settlement agreement (and current 303(d) assessment), existing information does not show that nitrogen is causing impairment in the areas of Great Bay Estuary materially impacted by these discharges. (*See* Attachments). Available data confirm that existing TN levels in the system are lower than those present in 2003 when no concerns over eelgrass or macroalgae impairments existed. The growing season average TN levels are, in fact, well below those reported in the literature as fully supporting eelgrass populations. They are also at or below the levels EPA has acknowledged are safe for eelgrass growth in Massachusetts estuaries (*i.e.*, < 0.35 mg/l TN growing season average). There is no rational scientific or regulatory basis for EPA to assert that the communities of Dover, Rochester or Portsmouth are causing or contributing to a TN impairment in estuarine waters.

Imposition of Appendix H enhanced BMP requirements and additional study requirements are not supportable.

- EPA should not be seeking to impose more restrictive requirements on any MS4 discharge where NHDES has expressly determined that the current data do not verify an impairment for that pollutant (*e.g.*, TN for Great Bay Estuary and fresh water section of the Cocheco River). Likewise, EPA should not seek to substitute its judgment regarding nutrient impairments on rivers or streams or seek immediate action simply because new data are collected. A process of data evaluation, verification and analyses must precede any determination that more restrictive actions by an MS4 community is required, as occurs with the State's 303(d) evaluation process and the issuance of NPDES permits. This case should be treated no differently.

The Requirement to Mirror Pre-development Hydrology Is Beyond Federal Authority

Section 2.3.6 seeks to impose a pre-development hydrology requirement on any new development or redevelopment. Federal courts have repeatedly informed EPA that it lacks authority to regulate based on flow or, to put it differently, to treat flow as a surrogate pollutant. *Va. Dep't of Transp. v. EPA*, No. 1:12-CV-775 (E.D.Va. Jan. 3, 2013). Therefore, all flow-based restrictions contained in this proposed rule must be deleted.

The following directives on requirements for stormwater programs/ordinances in Section 2.3.6.a.ii are also beyond federal authority and more restrictive than the adopted regulatory requirements found in 40 CFR 122.26:

1. Provision a - mandating use of low impact development "to the maximum extent feasible" – EPA is illegally dictating the design of pollution reduction requirements which is beyond its statutory authority *See Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013).

2. Provision b – mandating "no untreated discharge" for chloride found in a snow storage area. No treatment technology can assure such a requirement regardless of the circumstances. This must be qualified "as practicable" pursuant to the statute.

3. Provision c – mandating compliance with a state design practices manual, "as amended, as applicable." This manual must be subject to formal notice and comment if it is to be federally enforceable. Moreover, the requirement to comply with "amended" documents violates NPDES rules which only allow permits to be derived based on existing requirements, not some future document that is not presently available for review. Finally, the inclusion of the statement "as applicable" renders the entire provision void

for vagueness. Who determines what is "applicable" and when do they do this? The applicability of requirements must be known presently to allow a permittee to understand the significance of a requirement and to ensure it knows what to comply with.

4. Provision d – mandating groundwater recharge, control of peak flow rates and channel protection – the Clean Water Act controls pollutants – it does not address any of these requirements which are not within EPA's statutory authority to regulate.

5. Provision e – also illegally regulates groundwater recharge as a CWA requirement. This requirement is beyond the CWA and therefore should be deleted.

Appendix F Comments - Existing TMDLs

Chloride TMDLs – It is not apparent how the specific measures outlined in this section are demonstrated to be both necessary and appropriate for meeting any adopted chloride TMDL reduction requirements. The Appendix, however, outlines a series of measures that must be implemented "at a minimum." EPA is again improperly dictating the corrective measures that must be implemented, rather than allowing the permittee to determine what makes sense, is required to address TMDL load reductions and is practicable in this instance. Unless EPA can demonstrate that these requirements are the minimum ones necessary to ensure water quality is attained (which is not presented in the background materials), the "at a minimum" language must be struck and replaced with "at the permittee's discretion as necessary to meet water quality objectives."

Bacteria TMDLs – As noted earlier the statewide bacteria TMDL did not establish specific effluent limits but recommended that future assessment efforts consider available dilution in determining what load reductions (if any) are necessary. Given the amount of time that has transpired from the adoption of those TMDLs, it is not apparent that any of the other TMDL recommendations are based on current information regarding existing water quality for any of these areas. Note, for example – stating that the goal of implementation of the Hampton/Seabrook Harbor TMDL is "remove all human sources of bacteria to extent practicable" is not an effluent limit and would certainly require further definition. Some load reduction recommendations (like that of Little Harbor – 12%) are well within the variation of the test method itself. Finally, as recognized by the Statewide Bacteria TMDL, many beach impaired waters are often impacted by bacteria loadings from the swimmers themselves or local septic systems. So, the MS4 loads may not be the material factor controlling compliance. While seeking to educate dog owners may be a common sense step, implementing the illicit discharge program (enhanced BMP i.2) and designating all catchments draining to the water body as a HIGH priority for IDDE implementation is not justified by the background documentation or the TMDLs themselves.

Phosphorus TMDLs – The reported load reductions required for the MS4 communities ranged from 40-80% TP reduction. The CWA requires that MS4 load reductions occur "to the maximum extent practicable." There is no information in the record showing that these load reductions are attainable. EPA needs to recognize that the duty to reduce loadings is governed by the statutory language.

Appendix – H – Nitrogen (and Other) Reduction Requirements Where No TMDL Is Established

The section proposes imposition of enhanced BMPs for all MS4 communities tributary to an area designated as nutrient impaired due to nitrogen. This is inappropriate and premature. The extent of existing nitrogen impairments are poorly understood as confirmed by the recent draft 2014 Section 303(d) list and the 2014 Peer Review Report that are in EPA's possession. Pending the resolution of these uncertainties on whether or not any nitrogen impairment actually exists in the Great Bay system, it is premature to mandate enhanced BMPs and additional studies. Moreover, establishing that nitrogen must be "unmeasurable" (Provision I.2) to avoid enhanced BMPs and study requirements is arbitrary and capricious. This provision essentially established that a zero nitrogen discharge must exist for BMPs to be avoided. This is a form of effluent limitation that has no basis in the administrative record.

Likewise, the mandates for additional BMP measures and other detailed/costly studies simply because a water body is listed as impaired for a pollutant, prior to determining whether or not the MS4 is a meaningful cause of the situation, is arbitrary and capricious as it regulates on presumption rather than data and analyses. EPA should not be squandering local resources based on speculation and innuendo rather than sound scientific analyses. Finally, there is no information showing that enhanced BMPs rather than the BMPs typically intended to be implemented will not be more than sufficient to address concerns with contributing MS4 loads. Until such information is presented, it is not defensible to presume that special, additional reduction methods must be employed.